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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

HENRIETTA GUTIERREZ,

Plaintiffs and Appellants,

v.

COUNTRYWIDE HOME LOANS, INC.,

Defendant and Respondent.

B218816

(Los Angeles County  
Super. Ct. No. LC083200)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Richard A. Adler, Judge. Affirmed.

Synder ♦ Dorenfeld, David K. Dorenfeld, Michael W. Brown for Plaintiffs and Appellants.

Bryan Cave, Jennifer A. Jackson, Douglas E. Winter for Defendant and Respondent.

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After losing property in foreclosure, appellants filed suit against their lender. The lender allegedly misrepresented that it had “canceled” the foreclosure sale, then sold the property without further notice to appellants. The trial court sustained the lender’s demurrers without leave to amend, and entered judgment for the lender. We affirm. The lender only *postponed* the sale: it did not “cancel” it. During the postponement, appellants did not tender the full amount owing on the accelerated note, or otherwise cure their default.

### **FACTS<sup>1</sup>**

Appellants Henrietta and Jason Gutierrez allege that in 2004, they purchased residential property in Rancho Cucamonga. Appellants do not allege that they obtained a loan from respondent Countrywide Home Loans (the Lender).<sup>2</sup> Appellants do not allege that they ever made payments on the loan. Appellants do not allege that they tendered payment to cure a default. However, appellants do allege that “in or around early to mid 2007, Defendant initiated foreclosure proceedings on THE PROPERTY.”

After receiving a foreclosure notice, appellants had telephone conversations with three of the Lender’s employees. The employees allegedly “represented that they would attempt to reach a work-out agreement with Plaintiffs and would not foreclose on THE PROPERTY without providing notice to Plaintiffs of the foreclosure date. In these conversations, Defendants further represented that initiation and completion of foreclosure proceedings could take two to three months.”

On November 7, 2007, the Lender sent appellants a letter, which is attached as an exhibit to the FAC. It reads, “Thank you for contacting our office regarding the above-referenced home loans. [¶] As we discussed, this letter will serve as confirmation that the

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<sup>1</sup> The facts are contained in the first amended complaint (FAC) and an exhibit attached to it. We assume the truth of properly pleaded material allegations. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

<sup>2</sup> The Lender asked the trial court to take judicial notice of appellants’ deed of trust, which is contained in the record.

foreclosure sale previously scheduled for November 16, 2007, has been postponed. As of the date of this letter no new sale date has been scheduled.”

In late December 2007, appellants discovered that the Lender had proceeded with the foreclosure sale. In connection with the sale, the Lender removed several items of appellants’ personal property. Appellants demanded that the Lender rescind the sale, reinstate their loan, and return their personal property.

Appellants believe the Lender reneged upon its promise not to foreclose without giving prior notice. Appellants claim: “Had Defendant properly notified Plaintiffs of its intent to proceed with a foreclosure sale on December 14, 2007, Plaintiffs would have undertaken efforts necessary to cease the foreclosure sale, including but not limited to tendering any amount in default.” The FAC asserts a single cause of action for negligent misrepresentation.

## **DISCUSSION**

### **1. Appeal and Review**

Appeal lies from the court’s judgment in favor of the Lender. (Code Civ. Proc., § 904.1, subd. (a)(1).) We review de novo the ruling on the demurrer, exercising our independent judgment to determine whether a cause of action has been stated. (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) The demurrer tests the sufficiency of the plaintiff’s claims as a matter of law. The only ruling reviewed for an abuse of discretion is the trial court’s denial of leave to amend. (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 43-44.)

### **2. Ruling on the Demurrer**

“The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with the intent to induce another’s reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.” (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 402; CACI No. 1903; Civ. Code, § 1710, subd. 2.)

The Lender's employees allegedly "represented that they would attempt to reach a work-out agreement with Plaintiffs . . . ." In the context of a fraud claim by a borrower against a lender, this representation has no legal effect. "The terms of a restructuring agreement obviously may vary as widely as the terms of the original agreement. Unless an agreement to restructure a loan embodies definite terms, capable of enforcement, it is not a legally valid contract. 'Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement.' [Citation.] [Plaintiffs'] understanding that the notes would be 'redone' thus raises no triable issue as to a legally enforceable understanding inconsistent with the written terms of the notes." (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 483.)

At the time of the alleged misrepresentation, appellants were in breach of their loan contract with respondent. To avoid foreclosure, appellants were required to cure their default. Appellants do not allege that they paid any consideration to secure the Lender's agreement to alter the terms of the loan contract. Appellants could not justifiably rely on an oral representation about a possible future attempt to negotiate a loan work-out to supplant their existing contractual duty. At the very least, appellants had to allege that they continued to make monthly loan payments in reliance upon the Lender's statement that it would consider a loan modification.

The FAC alleges that the Lender issued "a written notice confirming the prior representations that Defendant had *canceled* the foreclosure sale of THE PROPERTY, and further represented that no new date for a foreclosure sale had been scheduled." (Italics added.) Contrary to the allegations in the FAC, the November 7, 2007, letter from the Lender did not "cancel" the foreclosure sale. Instead, it confirmed "that the foreclosure sale previously scheduled for November 16, 2007, has been *postponed*." (Italics added.) To "cancel" means "To rescind; abandon; repeal, surrender; waive; terminate"; to "postpone" means "To put off; defer; delay; continue . . . . The term carries with it the idea of deferring the doing of something or the taking effect of something until a future or later time." (Black's Law Dict. (6th ed. 1990) pp. 206, 1168.)

If the facts contained in exhibits attached to the pleading contradict facts alleged in the pleading, “the facts in the exhibits take precedence.” (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447; *Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 567-568.) In this case, the attached exhibit says “postponed” not “canceled.” The language in the exhibit controls.

In their brief, appellants maintain that they “did not act . . . to stave off a foreclosure sale since they had been told and believed that no such sale was forthcoming.” Appellants’ belief was unreasonable, as a matter of law. The November 7 letter contains no promise that the Lender was giving up its right to proceed with the foreclosure sale: rather, the event was merely “postponed,” i.e., put off to a later date. The letter does not relieve appellants of their contractual duty to cure the default. The letter does not contain any promise to restructure the loan. Finally, the letter does not promise any further notice before the foreclosure sale occurred.

Apart from unreasonably relying on an oral representation that was at odds with the written loan contract and the November 7 confirmation letter, appellants did not establish the element of actual damage. “Misrepresentation, even maliciously committed, does not support a cause of action unless the plaintiff suffered consequential damages.” (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 159.) As noted above, appellants’ preliminary discussions with the Lender did not result in a contractually binding amendment to the existing loan agreement. Appellants’ claimed damages all relate to their inability to repay their loan, rather than any detriment caused by the Lender’s short-lived statements that it would consider a loan modification. Appellants do not allege that they were in a financial position to tender full repayment on the accelerated note, or that they would qualify for a new loan from another bank, after receiving the notice of foreclosure. “[I]f plaintiffs could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damage to the plaintiffs.” (*FPCI RE-HAB 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1022.)

It is pure speculation that appellants were damaged by the foreclosure sale. Appellants were not in any different position as a result of the Lender's alleged representation that it "would attempt to reach a work-out agreement" than they would have been if the Lender adamantly refused to modify the loan when appellants called. (See *Conrad v. Bank of America*, *supra*, 45 Cal.App.4th at pp. 159-160.) The Lender was under no obligation to modify the loan after appellants defaulted, which caused the note to accelerate and the full loan amount to become due and owing. According to the FAC, the Lender initiated foreclosure proceedings "in or around early to mid 2007," then told appellants that completion of foreclosure "could take two to three months." Appellants could not have been surprised when the foreclosure sale occurred in December 2007, over six months after proceedings were initiated.

### **3. Request to Amend**

Appellants contend that they could assert other valid claims, based on the facts alleged in the FAC. It is an abuse of discretion for the court to deny leave to amend "if there is any reasonable possibility that the defect can be cured by amendment." (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The burden is on the plaintiff to show in what manner the pleading could be amended. (*Ibid.*) Failure to request an amendment in the trial court does not prevent a plaintiff from making such a request for the first time on appeal. (Code Civ. Proc., § 472c; *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 861.)

#### **a. Promissory Estoppel**

"[T]he doctrine of promissory estoppel is used to provide a substitute for the consideration which ordinarily is required to create an enforceable promise." (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 672.) "Under this doctrine, a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement." (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 249.) The elements of promissory estoppel are: (1) a "clear and unambiguous" promise; (2) reasonable and foreseeable reliance on the promise; and (3) injury as a result of the

reliance. (*Cooper v. State Farm Mutual Automobile Ins. Co.* (2009) 177 Cal.App.4th 876, 892, fn. 3; *Helmer v. Bingham Toyota Isuzu* (2005) 129 Cal.App.4th 1121, 1129, fn. 3.)

Here, appellants claim a promise by the Lender, “both written and oral,” “to cancel the foreclosure sale and to provide notice in the event that such a sale was to be scheduled later on.” The Lender promised only to “postpone” the foreclosure sale, and it did so for a period of one month. The confirming letter did *not* promise to provide notice of the subsequent sale. Thus, there was no “clear and unambiguous” promise to restructure the loan, to “cancel” the foreclosure sale, or to provide further notice. Appellants could not reasonably believe that the Lender promised to cancel the sale, given the plain language of the November 7 letter.

*b. Negligence Per Se*

The negligence per se doctrine is codified in Evidence Code section 669, which creates a presumption of failure to exercise due care if (1) the defendant violated a statute; (2) the violation caused injury; (3) the injury resulted from an occurrence that the statute was designed to prevent; and (4) plaintiff falls within the class of persons for whose protection the statute was adopted. By applying negligence per se, the court adopts “the conduct prescribed by the statute as the standard of care for a reasonable person in the circumstances.” (*Alcala v. Vazmar Corp.* (2008) 167 Cal.App.4th 747, 755.)

Appellants argue that the Lender violated Civil Code section 2924g, subdivision (d): “The notice of each postponement and the reason therefor shall be given by public declaration by the trustee at the time and place last appointed for sale. A public declaration of postponement shall also set forth the new date, time, and place of sale and the place of sale shall be the same place as originally fixed by the trustee for the sale. No other notice of postponement need be given.”

Appellants’ negligence per se claim fails for two reasons. First, Civil Code section 2924g requires that the *trustee* give public notice of a postponement, and reset the date, time and place. We take judicial notice of appellants’ deed of trust, which states

that the trustee is “CTC Real Estate Services.” CTC Real Estate Services is the party that allegedly violated Civil Code section 2924g. The Lender is not charged with making a public declaration. Second, there is no allegation that the trustee failed to provide a *public* declaration setting forth the new date of the sale, as opposed to giving appellants personal notice. The trustee under a deed of trust is not the trustor’s fiduciary and has no duty to notify the trustor personally when a foreclosure sale will take place. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109.) Instead, the trustee must only provide notice as specifically required by statute. (*Ibid.*) In sum, there is no factual basis for a claim that the Lender violated Civil Code section 2924g.

**DISPOSITION**

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.